IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-369

MAURICE SHANNON, et al., *Petitioners*

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.

REPLY BRIEF FOR PETITIONERS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Petitioners rely on their Petition for Certiorari to support their argument that the Civil Rights Attorney's Fees Awards Act of 1976 waived sovereign immunity and that any other conclusion conflicts with the unmistakable intention of Congress to encourage private attorneys general and with this Court's statement in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 267 (1975) that "it would follow in such cases that attorney's fees should be awarded against the Government or the officials themselves." (Pet. 8). The legislative history of the Act supports that interpretation. In addition, Congress explicitly expressed its understanding that the general form of language used in the Fees Awards Act is effective to waive sovereign immunity in the legislative history of the Clean Air Act Amendments of 1977 which utilized similar general language. (Pet. 6-7). Consequently, this brief is limited to pointing out that certain arguments made by the

respondents are not conclusive of a contrary interpretation as asserted.

1. The suggestion that the amendment to authorize awarding fees against the United States in tax cases constitutes Congressional recognition "that the bill did not generally authorize fees against the United States" (Br. 5) is completely fallacious. The amendment was necessary to expand the scope of the bill from civil rights cases to tax cases. It contains no "explicit authorization" of fees against the United States, but authorization by "necessary implication." It does not therefore, "demonstrate" that fees are not authorized for civil rights cases. To the contrary, Senator Allen, in introducing his amendment, stated that it allowed recovery of attorney's fees "just as in the other cases", 122 Cong. Rec. S 17049 (daily ed. Sept. 29, 1976) and Senator Goldwater had urged a similar amendment "to help the victim of tax abuse *as much as* we help other victims whose rights are impaired." 122 Cong. Rec. S 16446 (daily ed. Sept. 22, 1976).

2. Respondents have failed to tell this Court that the amendment (No. 470) offered by Senator Helms and rejected by the Senate "that would have imposed the cost of attorney's fees on the government" (Br. 6) would also have extended attorney's fees to prevailing parties in all civil cases, not just civil rights actions, to acquitted defendants, and to prevailing parties in agency proceedings. 122 Cong. Rec. S 16257 (daily ed. Sept. 21, 1976). Rejection of that expansive amendment is not persuasive that the Senate rejected the modest principle of treating the United States like all other losing parties in civil rights cases.

Furthermore, the Senate rejected an amendment by Senator Allen (No. 2388) which would have explicitly exempted federal, state and local officials from paying attorney's fees unless they acted in a contumacious or vexatious manner, a provision which would have been unnecessary unless the Act waived sovereign immunity and

applied to federal officials. 122 Cong. Rec. S 16567, S 16637 (daily ed. Sept. 27, 1976).

3. There is no evidence that Mr. Railsback—the ranking minority member of the Sub-Committee which reported the bill—was "confused" or that he "thought only that attorney's fees could be awarded against the United States as plaintiffs." (Br. n.7). His statements (Pet. 9-10) that sovereign immunity was waived were framed in terms of the United States as plaintiff since those were the questions asked, but they were not based on any special provision regarding the United States as a plaintiff. Rather they were based on the general principle that the civil rights portion of the Act as well as the tax portion applied to the United States. It is not surprising that respondents offer no citations for their suggestion that the Act might authorize awards against the United States in civil rights cases only where it was a plaintiff.

4. Although the accompanying House and Senate Reports did state that no additional costs to the government would be incurred as a result of the legislation, there are no line item amounts in either the federal budget or the Department of Justice Appropriations Act, 1977, P.L. 94-362 for payment of costs in cases lost by the Justice Department even under the several acts such as Title VII and the Clean Air Act where fees are explicitly authorized. Presumably, the amounts involved are insignificant in a budget where the total sought for "Claims, Judgments and Relief Acts" was $225 million. *The Budget of the United States, Fiscal Year 1977, Appendix* p.606.

5. The fees initially acquiesced to by the Justice Department and awarded by two district court judges in *Women's Equality Action League v. Califano*, Civ. No. 74-1720 (D.D.C. May 3, 1978) and *Adams v. Califano*, Civ. No. 3095-70 (D.D.C. Oct. 25, 1977) were not authorized by 20 U.S.C. §1617 as stated by respondents (Br. n.4) since §1617 only applies to actions relating to elementary and

secondary education. The *Adams* decree of October 25, 1977, relating solely to higher education, therefore relied only on §1988 for the award of fees. The decrees in *Women's Equality Action League v. Califano* awarded fees for Title IX issues (which are not covered by §1617) as well as for Title VI and for issues relating to higher education as well as to secondary and elementary education and could therefore not have been supported solely by §1617.

This issue of the federal government's liability for attorney's fees under the Fees Awards Act will arise repeatedly in federal civil rights litigation and must eventually be determined by this Court. There is no obstacle to determination of the issue in this case. Little will be gained by further review of the brief legislative history in the circuit courts and prejudice will result to the plaintiffs herein if this matter is decided favorably to their position at some later date.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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